Nos. 82-791 and 82-913

In the Supreme Court of the United States

OCTOBER TERM, 1982

TEACHERS INSURANCE AND ANNUITY ASSOCIATION AND COLLEGE RETIREMENT EQUITIES FUND, PETITIONERS

v.

DIANA L. SPIRT, ET AL.

LONG ISLAND UNIVERSITY, PETITIONER

v.

DIANA L. SPIRT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS RESPONDENT, AND FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the use of sex-based actuarial tables to provide unequal pension benefits to male and female retirees violates Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (a)(1).

2. Whether Teachers Insurance and Annuity Association and College Retirement Equities Fund are "employers" within the meaning of Title VII.

3. If TIAA and CREF are employers, whether the McCarran-Ferguson Act precludes the application of Title VII to the retirement plan offered here.

4. Whether the relief mandated by the courts below is appropriate.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 691 F.2d 1054. The district

court's opinion of July 1, 1976 (Pet. App. 32a-43a) is reported at 416 F. Supp. 1019; its opinions of August 9 and September 12, 1979 (Pet. App. 44a-81a) are reported at 475 F. Supp. 1298; its opinion of March 19, 1982 (Pet. App. 82a-131a) is reported at 93 F.R.D. 627; and its opinion of January 23, 1976 (Pet. App. 28a-31a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1982 (Pet. App. 132a). The petition for a writ of certiorari in No. 82-791 was filed on November 9, 1982, and in No. 82-913 on November 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), provides in pertinent part:

> The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees * * * and any agent of such a person * * *.

Section 703(a)(1) of Title VII of that Act, 42 U.S.C. 2000e-2(a)(1), provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin * * *.

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), provides in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance * * *.

Section 204(g) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), provides that:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

Section 411(d)(6) of the Internal Revenue Code of 1954 (26 U.S.C. (Supp. V)) provides that:

> A plan shall be treated as not satisfying the requirement of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

STATEMENT

1. Respondent Diana L. Spirt, a tenured professor at Long Island University (LIU), a private educational institution, brought this action alleging that the use by Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF) of sex-segregated mortality tables which result in the payment to women of lower monthly retirement benefits than are paid to similarly situated men, violated Title VII of the Civil Rights Act of

1964, as amended (42 U.S.C. 2000e *et seq.*).[1] The Equal Employment Opportunity Commission (EEOC) intervened in this case on March 19, 1982 (Pet. App. 96a).

TIAA and CREF are non-profit organizations incorporated in the State of New York that provide retirement and insurance plans for the employees of educational institutions, including Long Island University (Pet. App. 3a, 45a). Participation in TIAA and CREF plans is limited to colleges, universities, independent schools and other nonprofit educational or research institutions (Pet. App. 45a). TIAA, which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching, offers what are in form fixed annuities for retirement plan participants. Its companion corporation, CREF, was established in 1952 to permit investment in common stock; CREF offers plan participants variable annuities (Pet. App. 3a-5a). By 1977, more than 85% of all private, four-year colleges and universities and more than 40% of all public colleges and universities had adopted retirement plans managed by TIAA-CREF (Pet. App. 3a). At that time, more than 400,000 employees of approximately 2,800 participating institutions were covered by the TIAA-CREF system (Pet. App. 3a).

Educational institution participation in the TIAA-CREF system is "normally established by a resolu-

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[1] The complaint also alleged that TIAA-CREF's use of sex-segregated tables violated the equal pay provision of the Fair Labor Standards Act, as amended in 1963, 29 U.S.C. 206(d), and the Equal Protection Clause of the Fourteenth Amendment (Pet. App. 33a). However, only Title VII issues are presented in this Court.

tion of the board of trustees" (J.A. 173).[2] In 1975, the trustees of Long Island University passed a resolution adopting the TIAA and CREF plan at issue here and establishing the conditions under which university employees would participate in the plan (J.A. 188-191). In addition, the resolution provides that, subject to the understanding that accrued benefits will not be affected, the "Board of Trustees of the University [re]serves the right to modify or discontinue the plan at any time" (J.A. 192).

Under that resolution, tenured faculty members such as respondent Spirt must participate in the LIU plan (Pet. App. 3a). The resolution also provided that each employee would contribute 5% of his salary to the plan and that the University would contribute an additional sum in the amount of 5% of the first $4,800 of an employee's yearly salary and 11% of yearly earnings in excess of $4,800 (Pet. App. 4a).

The university forwards all contributions, including those paid by participating employees, to TIAA and CREF (Pet. App. 4a). Each contribution made by or on behalf of an employee is credited to an individual account; each participating employee holds an individual contract with TIAA-CREF (J.A. 174-175). Although TIAA and CREF operate differently, both use mortality tables classified by sex in calculating plan benefits, because women as a class live longer than men as a class (Pet. App. 5a).[3] Be-

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[2] "J.A." refers to the joint appendix filed with the court of appeals.

[3] TIAA provides a fixed minimum annuity that is determined by applying a guaranteed interest rate to the contributions set aside in an "accumulation" for each participant, then converting this accumulation plus added "dividends" to a life annuity on the basis of this amount. Each contribution

cause benefits are calculated on the basis of sex-segregated tables, "female participants in the plans receive smaller monthly [retirement] payments than male participants of the same age, years in the plans, salary, and rate of contribution" (Pet. App. 46a).

2. After denying a motion for class certification, the district court granted summary judgment in favor of respondent Spirt. Applying this Court's decision in *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702 (1978), the district court held that Long Island University and CREF had violated Title VII by using sex-segregated mortality tables that resulted in payment of lower monthly retirement benefits to women than to similarly situated men (Pet. App. 58a-60a).[4] The court found that Long Island University and other educational institutions have "delegated their responsibility for and control over employee annuity plans to TIAA

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also provides entitlement to a specified sum as part of a minimum guaranteed annuity benefit. That sum is determined on the basis of sex-segregated rate schedules incorporated in the contract. TIAA reserves the right to substitute a different rate schedule, which may only apply to premiums collected after its adoption (Pet. App. 76a n.28; J.A. 174, 194, 197).

The CREF portion of the plan provides for a variable annuity (Pet. App. 5a). During a participant's career, CREF contributions are applied to the purchase of "accumulation units" representing an interest in CREF's investment portfolio. At retirement, accumulation units are converted into "annuity units," which are computed on the basis of sex-segregated mortality tables. The actual benefits received by retired participants vary with the market value of the CREF portfolio (Pet. App. 74a-75a).

[4] Finding no state action, the district court ruled against respondent Spirt on her constitutional claims. It did not reach her Equal Pay Act allegations (Pet. App. 3a).

and CREF" and, hence, TIAA and CREF are employers within the meaning of Title VII (Pet. App. 61a-62a). The court also held (Pet. App. 46a-53a) that TIAA (but not CREF) was in the "business of insurance" and, hence, insulated from Title VII liability by the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, which provides that "[n]o Act of Congress shall be construed to invalidate * * * any law enacted by any State for the purpose of regulating the business of insurance" (*id.* at 1012(b)) unless the federal act specifically so states. Because CREF was not insulated from Title VII liability, in September 1979 the court enjoined CREF from using sex-segregated mortality tables in calculating annuity benefits for persons who retire on and after May 1, 1980 (Pet. App. 134a-135a). The court also enjoined Long Island University from contributing to, or requiring its employees to contribute to, on and after July 1, 1980, any retirement program that uses sex-segregated mortality tables in calculating periodic benefits for persons who retire after that date (*ibid*).[5]

After the district court entered its judgment, all parties filed notices of appeal; the appeals were withdrawn from active consideration while settlement negotiations were conducted (Pet. App. 8a, 84a-85a). In the course of those negotiations, petitioners proposed several rate schedules that did not differentiate

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[5] By a series of stipulated orders, the defendants' compliance with the injunctive provisions of the district court's orders and judgment has been stayed pending appeals. The stipulated order of March 29, 1982, provides that if the judgment is affirmed, "the rights of all parties shall be determined as if the injunctive provisions * * * had been in full force and effect at all times since May 1, 1980 as to CREF and June 1, 1980 as to LIU."

between men and women, but failed to propose a rate schedule satisfactory both to EEOC and the New York State Superintendent of Insurance (*ibid.*). When settlement efforts proved unsuccessful, the court of appeals, in February 1981, ordered a limited remand to the district court to consider petitioners' objections to the relief ordered. Respondent EEOC thereupon moved to intervene as a party plaintiff (Pet. App. 8a-9a, 85a-86a).[6] The district court granted that motion as to the pending relief orders in March 1982, in an opinion that also rejected petitioners' objections to the relief ordered (Pet. App. 95a-96a, 125a-130a). Amended notices of appeal were filed in April 1982 (Pet. App. 9a).

On appeal, the court of appeals held that the use of sex distinct mortality tables violates Title VII (Pet. App. 14a); it agreed with the district court that there is "no meaningful distinction between the disparate treatment accorded the female employees in *Manhart*, * * * and the disparate treatment accorded the female TIAA-CREF participants in this case" (Pet. App. 10a). The court affirmed the ruling of the district court that TIAA-CREF are "employers", as defined in Section 701(b) of Title VII (42 U.S.C. 2000e(b)), since in the court of appeals' view that term was intended to "encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' * * * [as] defined at common law" (Pet. App. 14a). TIAA-CREF fell within the Title VII definition of employer, in the

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[6] **EEOC also instituted suit against the New York State Superintendent of Insurance, and moved to consolidate that action with this one (Pet. App. 86a). That motion was denied (Pet. App. 96a-98a).**

court's view, because TIAA-CREF exist solely for the purpose of enabling employer universities to delegate their responsibilities to provide retirement benefits for their employees, and are "so closely intertwined with those universities" (*ibid.*). The court also found it relevant that participation in the Long Island University plan was mandatory for tenured faculty, and that the university shares in the administrative responsibilities associated with faculty members' participation in the plan (*ibid*).

The court of appeals affirmed the district court's holding that CREF, as a variable annuity company, was not in the business of insurance within the meaning of the McCarran-Ferguson Act. However, it reversed the district court's holding as to TIAA, finding that "the historical context, the legislative history, and judicial interpretations of that history, [establish] that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance' " (Pet. App. 18a). In any event, the court concluded, Section 708 of Title VII explicitly pre-empted state law to the extent it approved of TIAA-CREF's discriminatory system (Pet. App. 19a).

Finally, the court approved and extended to TIAA the district court's grant of injunctive relief precluding CREF from using sex distinct mortality tables in calculating periodic retirement benefits for persons who retire on or after May 1, 1980. It also approved the relief awarded against Long Island University. The court based its approval on, inter alia, the facts

that "[t]he equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds" (Pet. App. 24a); that the alteration in the amount of future benefits will not alter any settled expectations of male participants and will likely reduce the benefits of only 40% of future male retirees by 1% to 8% (Pet. App. 26a & n.12); and that this Court's decision in *Manhart*, as well as other judicial decisions, put TIAA-CREF on notice that their practices with respect to calculating retirement benefits were illegal (Pet. App. 22a-23a).

3. The Sixth Circuit Court of Appeals, on essentially the same facts, has reached a conclusion directly contrary to that of the court below. *Peters* v. *Wayne State University*, 691 F. 2d 235 (1982), petition for cert. pending, No. 82-794.[7] There, the court of appeals rejected, as "clearly erroneous," the district court's conclusion that TIAA-CREF were employers. It relied, *inter alia*, on the fact that "Wayne State cannot control Teachers Annuity's administrative policies once its employees decide to join the Teachers Annuity Plan" and that "the decision to use sex-segregated mortality tables to compute annuity payments was Teachers Annuity's alone" (Pet. App. 139a). Citing *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), the court held that Wayne State University had not engaged in sex

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[7] The Wayne State University—TIAA-CREF retirement plan did not mandate employee participation, although employees who decline to participate forfeit the employer contribution. The court of appeals' decision in *Peters* is reproduced at Pet. App. 136a-145a. Further references to that decision will accordingly be to that document.

discrimination by selecting the facially discriminatory plan, because plaintiffs did not demonstrate that the university's "motivation was discriminatory or improper in any way" (Pet. App. 141a). The court distinguished this Court's decision in *Manhart, supra*, because *Manhart* involved "*unequal contributions* to an *employer-operated* pension fund" (Pet. App. 143a; emphasis in original). It then held that the use of sex-segregated actuarial tables resulting in unequal benefits was justified because men as a class received a benefit package equal to the package received by women as a class (Pet. App. 140a), and because the plan's payment differences were based upon longevity and not sex (Pet. App. 145a).

4. On October 12, 1982, this Court granted certiorari in *Arizona Governing Committee* v. *Norris*, No. 82-52, which involves a voluntary deferred compensation plan offered to its employees by the State of Arizona, in which employees may select among a variety of payout options available from private organizations the State has selected to participate in the plan. Those options include life annuities offered by a number of these organizations, which all use sex-based mortality tables. Accordingly, the monthly annuities available to female employees are smaller than to males who have deferred the same amount of income. Arizona claims that its plan does not violate Title VII, and also objects to the relief awarded (82-52 Pet.).

ARGUMENT

Petitioners in No. 82-791 correctly contend that the decision below is in direct conflict with that of the Sixth Circuit in *Peters* v. *Wayne State University*, *supra*, and that the questions presented are important ones in which a uniform national rule is appropriate and which accordingly warrant review by this Court.[8]

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[8] We do not, however, agree that the fourth question petitioners in No. 82-791 present warrants plenary review. That question—whether proof of discriminatory intent in the use of sex based mortality tables is necessary to prove a Title VII violation—was not discussed by the court of appeals in this case, and we submit that it is clear that proof of invidious intent is unnecessary where, as here, the employment benefits available to employees are explicitly differentiated on the basis of sex. See *Los Angeles Department of Water & Power* v. *Manhart*, *supra*, 435 U.S. at 712-713. In such circumstances, there is no need, as there was in *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981), and the other cases on which petitioners rely (Pet. 21), to determine whether such differences in treatment are based on gender or on some appropriate business reason. Intentional gender based distinctions, not justified as a bona fide occupational qualification, violate Title VII regardless of the employer's subjective motivation. Remarks of Sen. Humphrey, 110 Cong. Rec. 12724 (1964); Remarks of Sen. Dirksen, 110 Cong. Rec. 8194 (1964); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 796 (4th Cir. 1971); *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980, 996 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971); *Schaeffer* v. *San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972); *Jones* v. *Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969); *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972); *Williams* v. *General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

1. On the question of liability, we submit that the courts below correctly concluded that the use of sex-segregated actuarial tables to calculate employees' retirement benefits is unlawful under Title VII. In *Los Angeles Department of Water & Power* v. *Manhart*, *supra*, this Court held that a retirement plan that required women to contribute more than similarly situated men, because women as a class live longer than men, violated Section 703(a)(1) of Title VII (42 U.S.C. 2000e-2(a)(1)). The LIU plan at issue here is based on precisely the same rationale and operates in the same manner—on the basis of sex-segregated life expectancy tables—as the plan in *Manhart*. As the court of appeals concluded, there is no meaningful distinction between this plan and the disparate treatment accorded female employees in *Manhart*. Whether a woman contributes a greater amount of her compensation than a man for an equal benefit or contributes an equal amount for a lesser benefit, the use of sex based actuarial tables in calculating periodic benefits results in the same discrimination.

Reliance on "actuarial principles"—specifically, the assertion that "[b]ecause the group of women live more years than similarly situated men * * * lifetime annuity benefits must be paid at a lower periodic rate to the women" (82-791 Pet. 5)—as justification for their disparate treatment was expressly rejected in *Manhart* (435 U.S. at 710, footnotes omitted):

> [T]here is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is

characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII. * * * [W]hen insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers * * *. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one "subsidy" seem less fair than the other.

Last Term, the Court again emphasized that "the principal focus of [Title VII] is the protection of the individual employee" (*Connecticut* v. *Teal*, No. 80-2147 (June 21, 1982), slip op. at 13), and explained *Manhart* as holding that "fairness to the class of women employees as a whole could not justify unfairness to the individual female employee" (*id.* at 14). Petitioners in *Teal* contended that Title VII is not violated, despite a showing that a facially neutral policy has a discriminatory impact on certain employees, if it is also shown that the policy is administered in a way that results in a racially neutral work force (slip op. 12). The Court rejected this "bottom line" defense: because Title VII protects individuals, not groups, it is not satisfied simply by a showing that the challenged policy is fair to the group as a whole (slip op. 13-14). Petitioners here, and the court of appeals in *Peters*, offer the same "bottom line" defense rejected in *Teal*, in an attempt to justify a facially discriminatory policy. But it follows a

fortiori from *Teal* that where the challenged policy is facially discriminatory rather than neutral (in other words, where the case is one of discriminatory treatment rather than discriminatory impact), it cannot be justified by showing that the class as a whole has nevertheless been fairly treated (*Teal* slip op. at 14-15). It is simply irrelevant for Title VII purposes that women as a group receive total annuity benefits equal to men as a group. The violation consists of the payment to each individual woman of smaller monthly benefits than are paid to a similarly situated man. *Teal* teaches that that violation cannot be justified by reliance on the treatment of other members of the victim's class, either individually or as a group.[9]

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[9] TIAA-CREF also assert, without explaining their rationale, that because employee contributions are credited to individual accounts, their plans are outside the scope of *Manhart* (Pet. 15-16 & n.6). The fact that prior to the date of retirement, TIAA and CREF maintain individual accounts for employees participating in their plans does not mean that funds cannot be converted into annuities on a sex-neutral basis, or that *Teal*, and *Manhart's* discussion of group insurance practices, are inapplicable to TIAA and CREF plans. Although contributions paid by or on behalf of employees who have not yet retired, as well as pre-retirement dividends, are credited to individual accounts, at no time before or after retirement can any participant withdraw these funds. Moreover, the record reveals that those individual accounts disappear once an employee retires. At the date of retirement, an employee "settles" his contract with TIAA and CREF and receives a promise of future annuity payments (J.A. 177). Thus, all funds paid by or on behalf of employees as well as all investment earnings attributable to their contributions become part of a common pool that is used for further investment and payment of annuity benefits. Accordingly, retired employees with short lives will subsidize retired employees with longer lives, regardless of the sex of the particular indi-

2. The court of appeals below acknowledged that respondent Spirt "is not an employee of TIAA-CREF in any commonly understood sense" (Pet. App. 14a). But because TIAA and CREF exist "solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees," and participation in their programs is mandatory for tenured faculty members at LIU, the courts below ruled that TIAA and CREF should be viewed as employers within the meaning of Title VII (*ibid.*).[10] In addition, the court of appeals ruled that educational institutions had, in effect, delegated to TIAA and CREF their responsibilities as employers to provide retirement plans (Pet. App. 14a-15a).

The Sixth Circuit in *Peters*, by contrast, ruled that TIAA and CREF were not employers because their responsibility is limited to management of the retirement funds and disbursement of individual annuities

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viduals in either group. *Manhart's* group insurance discussion is therefore, like *Teal*, fully applicable to the TIAA and CREF plans.

[10] The court of appeals adopted the proposition that the term "employer" in Title VII " 'is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an "employer" of an aggrieved individual as that term has generally been defined at common law' " (Pet. App. 14a). That standard could be read to extend Title VII to the admissions policies of educational institutions and the membership policies of private clubs and other institutions clearly not intended to be covered by Title VII. Reliance on the broad proposition is not necessary to the decisions of the courts below. In any event, the statutory definition of the term employer would, in light of the conflict in the circuits, appropriately be an issue for this Court ultimately to resolve.

(Pet. App. 139a). They were not agents of the educational institutions, the Sixth Circuit held, because those educational institutions did not, and could not, control them; the decision to use sex based tables was solely that of TIAA and CREF (*ibid.*). For those reasons, the Sixth Circuit reversed as "clearly erroneous" the district court's holding that they were employers (*ibid.*).

More than 400,000 employees of approximately 2800 colleges and universities participate in the TIAA-CREF system (Pet. App. 3a). Although the conflict between the Sixth Circuit and the Second Circuit as to whether TIAA and CREF should be considered employers or agents of employers within the meaning of Title VII is in part based upon facts peculiar to TIAA and CREF, the conflict between the circuits affects the rights and liabilities of the many employees of educational institutions, and it is sufficiently important to warrant review by this Court.

The issue of whether TIAA and CREF are employers covered by Title VII, however, is concededly separate from the question of liability, because in this case the educational institution (Long Island University) is a party to the suit and a petitioner in this Court (No. 82-913), and can be held liable for any violation of Title VII. TIAA and CREF are properly before the courts as parties necessary for relief under Rule 19, Fed. R. Civ. P., even if they are not employers. If liability under Title VII is sustained, however, the question whether TIAA and CREF are employers or agents of employers within the meaning of Title VII is significant in determining the rights and obligations of the parties, as to matters of monetary liability and liability for attorney's fees, and may also be of practical significance in fashioning prospective relief.

3. If TIAA and CREF are employers within the meaning of Title VII, there remains the question whether the McCarran-Ferguson Act is a "defense" to any Title VII liability which might otherwise be imposed. There is no conflict between the circuits on this question, and standing alone the issue might not warrant review by this Court in the absence of a conflict. TIAA and CREF have raised the issue in their petition, however. If the Court agrees that the conflict in the circuits on the other questions presented warrants review, it may wish to grant review on this issue as well, in order to resolve the whole controversy here.

4. There remains the question whether the relief ordered in this case was appropriate. This Court recognized in *Manhart*, *supra*, 435 U.S. at 721, the special problems inherent in formulating appropriate relief in this area because of the "potential impact which changes in rules affecting insurance and pension plans may have on the economy * * * [by creating] major unforeseen contingencies [that] jeopardize[] the insurer's solvency and, ultimately, the insureds' benefits." These very concerns—the need to insure financial integrity of retirement systems and the desire to protect the interests of employees and their beneficiaries—led to the passage of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, which requires covered plans to conform to specified minimum standards.[11] Both the statutory

[11] Title I of ERISA applies generally to pension plans established or maintained by employers or unions engaged in or affecting interstate commerce (29 U.S.C. 1003(a)). Title II of ERISA, and subchapter D of chapter 1 of the Internal Revenue Code (26 U.S.C. (& Supp. V) 401-415), contain standards to qualify pension, profit-sharing and stock bonus

language of ERISA and its legislative history demonstrates that Title VII applies to ERISA plans.[12]

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plans for favorable tax treatment. Those standards are substantially identical to the ones in Title I.

The plan involved in *Norris* is a "governmental plan" exempt from coverage under Title I of ERISA. See Section 4(b)(1), 29 U.S.C. 1003(b)(1); Section 3(32), 29 U.S.C. 1002(32). Title II is also inapplicable to such plans because their tax status is generally governed by either Section 457 of the Internal Revenue Code (26 U.S.C. (Supp. V)) or by the provisions of that Code that were in effect before the passage of ERISA (26 U.S.C. 410(c)(2), 411(e)(2)).

While the question was not developed in the courts below, the plan involved in this case appears to be a "pension plan" for purposes of Title I, but not for Title II, of ERISA. This case involves retirement income arrangements sometimes referred to as "tax-sheltered annuities" or "section 403(b) annuities." These are annuity contracts purchased by employers for individuals who work for either public schools (including colleges and universities) or certain tax-exempt organizations. Within limits, the amounts contributed by the employer for such contracts are not taxable to the employee. Such arrangements are not subject to the requirements applicable to "qualified" pension, profit-sharing, and stock bonus plans under Section 401(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)). Since there is no trust corpus, there is no "plan" within the meaning of the Code. However, such an arrangement is considered a "pension plan" for purposes of Title I of ERISA if it is maintained by an employer, an employee organization or both (and is not otherwise excluded from coverage). A Department of Labor regulation (29 C.F.R. 2510.3-2(f)) states that certain tax-sheltered annuity arrangements are not maintained by an employer if all of a fairly lengthy list of requirements are satisfied, including the requirement that participation be completely voluntary (the LIU plan, by contrast, is mandatory for tenured faculty members).

[12] Section 514(d) of ERISA, 29 U.S.C. 1144(d), provides that nothing in ERISA "shall be construed to alter, amend,

In reconciling the policies and requirements of ERISA and the concerns noted in *Manhart* with the need to provide effective relief for Title VII violations, four principal remedial approaches are conceivable: (1) an order that the benefits of future retirees be calculated from sex-neutral actuarial tables; (2) an order that the benefit level of the disfavored class be raised to that of the favored class ("topping up"); (3) a hybrid order, requiring the use of sex-neutral tables to calculate benefits attributable to future contributions, and "topping up" for benefits attributable to past contributions; and (4) an order requiring the use of sex-neutral tables only for benefits accruing after the date of the order.[13]

The relief awarded in this case against petitioner LIU appears to be a variant of category (4) above—the least extensive of the four categories of relief. There is, accordingly, no substantial basis for contending that it was excessive, and indeed petitioner LIU makes no such contention. If this Court con-

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modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under any such law."

In both the Senate and the House there was discussion of amending ERISA to include a provision prohibiting sex-based discrimination in pensions. The proponents of the amendments agreed on the floor not to offer them because both Senator Williams and Representative Dent (the floor managers) gave express assurances that Title VII already prohibited discrimination in pension benefits, citing previously decided Title VII cases. 119 Cong. Rec. 30409-30410 (1973); 120 Cong. Rec. 4726 (1974). The fact that Congress determined that Title VII applies to ERISA plans, however, does not suggest that Title VII relief may not be fashioned taking into account ERISA concerns.

[13] The options involving "topping up" could have a significant financial impact on pension plans.

cludes that it was also proper to award relief against TIAA or CREF (see pages 16-18, *supra*), it will be necessary as well to consider the propriety of the relief ordered against them (a somewhat more extensive form of relief than that awarded against LIU).[14]

CONCLUSION

Two issues presented by this case—the applicability of Title VII to sex-based actuarial tables and the question whether TIAA-CREF are employers covered by that Title—are worthy of review by this Court. *Norris* raises the liability issue (in a somewhat different context), but not the employer issue. For that reason the Court may wish to hold this case until *Norris* has been decided and then, to the extent necessary, grant certiorari in this case to decide the remaining issues not disposed of in *Norris*.

Respectfully submitted.

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[14] The EEOC, which supported the relief awarded against TIAA-CREF in the courts below, adheres to the position that that relief was proper under Title VII.

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